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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 204, 214, 248, and 274a

[CIS No. 2515-11; DHS Docket No. USCIS-2012-0005]

RIN 1615-AC00

Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Homeland Security (DHS) is revising its regulations affecting: highly skilled workers in the nonimmigrant classifications for specialty occupation from Chile, Singapore (H-1B1), and Australia (E-3); the immigrant classification for employment-based first preference (EB-1) outstanding professors and researchers; and nonimmigrant workers in the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) classification. DHS anticipates that these changes to the regulations will benefit these highly skilled workers and CW-1 nonimmigrant workers by removing unnecessary hurdles that place such workers at a disadvantage when compared to similarly situated workers in other visa classifications.

DATES: This final rule is effective [Insert date 30 days from date of publication in the **FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION: DHS is revising its regulations affecting: (1) highly skilled workers in the nonimmigrant classifications for specialty occupation from Chile, Singapore (H-1B1), and Australia (E-3); (2) the immigrant classification for employment-based first preference (EB-1) outstanding professors and researchers; and (3) nonimmigrant workers in the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) classification.

Specifically, in this final rule, DHS is amending its regulations to include H-1B1 and principal E-3 classifications in the list of classes of foreign nationals authorized for employment incident to status with a specific employer, and to clarify that H-1B1 and principal E-3 nonimmigrants are allowed to work without having to separately apply to DHS for employment authorization.

DHS is also amending the regulations to provide H-1B1 and principal E-3 nonimmigrants with authorization for continued employment with the same employer if the employer has timely filed for an extension of the nonimmigrant's stay. DHS is providing this same authorization for continued employment for CW-1 nonimmigrants if a petitioner has timely filed a Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, or successor form requesting an extension of stay.

In addition, DHS is updating the regulations describing the filing procedures for extensions of stay and change of status requests to include the principal E-3 and H-1B1 nonimmigrant classifications. These changes will harmonize and align the regulations for

principal E-3, H-1B1, and CW-1 nonimmigrant classifications with the existing regulations for other, similarly situated nonimmigrant classifications.

Finally, DHS is expanding the current list of initial evidence for EB-1 outstanding professors and researchers to allow petitioners to submit evidence comparable to the other forms of evidence already listed in 8 CFR 204.5(i)(3)(i). This will harmonize the regulations for EB-1 outstanding professors and researchers with certain employment-based immigrant categories that already allow for submission of comparable evidence.

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I. Executive Summary

A. Purpose of the Regulatory Action

DHS is amending its regulations in several ways to improve the programs serving the principal E-3, H-1B1, and CW-1 nonimmigrant classifications and the EB-1 immigrant classification for outstanding professors and researchers. These changes will harmonize the regulations governing these classifications with regulations governing similar visa classifications and remove unnecessary hurdles that have placed principal E-3, H-1B1, CW-1 and certain EB-1 workers at a disadvantage when compared to similarly situated workers in other visa classifications. DHS believes this rule also best achieves our goal of addressing unwarranted disparities involving continued employment authorization among and within particular nonimmigrant classifications.

B. Legal Authorities

Sections 103(a) and 214(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1103(a) and 8 U.S.C. 1184(a)(1), authorize the Secretary of Homeland Security (Secretary) to administer and enforce the immigration and nationality laws and to establish by regulation the time and conditions of admission of nonimmigrants. See also section 451 of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, (6 U.S.C. 271) (describing responsibilities with respect to immigration services and adjudications). Further, section 274A(h)(3)(B) of the INA, 8 U.S.C. 1324a(h)(3)(B),

recognizes the Secretary's authority to extend employment authorization to individuals who are not citizens or nationals of the United States. Finally, title VII of the Consolidated Natural Resources Act of 2008 (CNRA) extends U.S. immigration laws to the CNMI and authorized the CW nonimmigrant classification. Public Law 110-229, 122 Stat. 754, 853 (2008) (revising 48 U.S.C. 1806).

C. Summary of the Major Provisions of the Regulatory Action

On May 12, 2014, DHS published a proposed rule to amend regulations governing filing procedures and work authorization for principal E-3 and H-1B1 nonimmigrants (8 CFR 214.1(c)(1) and 8 CFR 248.3(a) with respect to filing procedures and 8 CFR 274a.12(b)(9) and 8 CFR 274a.12(b)(25) with respect to work authorization), continued work authorization for principal E-3, H-1B1, and CW nonimmigrants (8 CFR 274a.12(b)(20)), and evidentiary requirements for EB-1 outstanding professors and researchers (8 CFR 204.5(i)(3)(ii)). By proposing this rule, DHS intended to remove current regulatory obstacles that may cause unnecessary disruptions to petitioning employers' productivity. DHS also intended to remove obstacles for these workers to remain in or enter the United States and to treat them in the same way as others under similar classifications are treated. See Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants and EB-1 Immigrants, 79 FR 26870 (May 12, 2014). After careful consideration of public comments, DHS is adopting the proposed regulatory amendments without change.

D. Cost and Benefits

This final rule will not impose any additional costs on employers, workers, or any governmental entity. Changing the employment authorization regulations for H-1B1 and

principal E-3 nonimmigrants will make those regulations consistent with the regulations of other similarly situated nonimmigrant worker classifications, which will provide qualitative benefits. In this final rule, DHS also amends its regulations to authorize continued employment for up to 240 days for H-1B1, principal E-3, and CW-1 nonimmigrant workers whose status has expired, provided that the petitioner timely filed the requests for extensions of stay with U.S. Citizenship and Immigration Services (USCIS). Such amendment will minimize the potential for employment disruptions for U.S. employers of H-1B1, principal E-3, and CW-1 nonimmigrant workers. Finally, this final rule may assist U.S. employers that recruit EB-1 outstanding professors and researchers by expanding the range of evidence that they may provide to support their petitions. A summary of the costs and benefits of the changes made by this rule is presented in Table 1.

Table 1: Summary of Costs and Benefits		
Costs	Change	Benefits and Avoided Costs
	E-3, H-1B1, and CW-1 Nonimmigrants	
None	Continued employment up to 240 days for an H-1B1, principal E-3 or CW-1 nonimmigrant workers while a timely filed request to extend stay is pending.	Avoided cost of lost productivity for U.S. employers of principal E-3, H-1B1, and CW-1 nonimmigrant workers and avoided lost wages by the nonimmigrant workers. Not quantified.
		Will provide equity for principal E-3 and H-1B1 nonimmigrants relative to other employment-based nonimmigrants listed in 8 CFR 274a.12 (b)(20), and provide equity for CW-1 nonimmigrants whose extension request is filed by the same employer relative to other CW-1 nonimmigrants who change employers. Qualitative benefit.
	Clarify that principal E-3 and H-1B1 nonimmigrants are work authorized	Ensures the regulations are consistent with statutory

	incident to status, and specify current filing procedures for requesting change of status or extension of stay.	authority, and codifies current practice. Qualitative benefit.
	EB-1 Outstanding Professors and Researchers	
	Allow for the submission of comparable evidence to that listed in 8 CFR 204.5(i)(3)(i)(A) – (F) to establish that the EB-1 outstanding professor or researcher is recognized internationally as outstanding in his or her academic field.	May help U.S. employers recruit EB-1 outstanding professors and researchers. Not quantified. Will provide equity for EB-1 outstanding professors and researchers relative to certain employment-based immigrants listed in 8 CFR 204.5. Qualitative benefit.

II. Background

A. Current Framework

The Immigration Act of 1990 (IMMACT90), among other things, reorganized immigrant classifications and also created new employment-based immigrant classifications. See Public Law 101-649, 104 Stat. 4978. The new employment-based immigration provisions were intended to cultivate a more competitive economy by encouraging skilled individuals to immigrate to the United States to meet our economic needs.¹ Those IMMACT90 provisions addressed the need of American businesses for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel could not be found. See Employment-Based Immigrants, 56 FR 30703 (July 5, 1991). Lawmakers estimated the need for highly skilled workers based on an increasing skills gap in the current and projected U.S. labor pools. Id.

¹ See Statement by President upon Signing of the Immigration Act of 1990, 1990 U.S.C.C.A.N 6801-1 (Nov. 29, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#ixzz1KvDIYZql>; see also H.R. Rep. No. 101-723(I), at 6721 (1990) (“[I]mmigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers.”).

American businesses continue to need highly skilled nonimmigrant and immigrant workers, and the U.S. legal immigration system can be improved by removing regulatory barriers to lawful employment of these workers through a system that reflects our diverse values and needs.² Attracting and retaining highly skilled workers is critical to sustaining our Nation's global competitiveness. By attracting the best and brightest from around the world, the United States can harness their talents, skills, and ideas to help the U.S. economy grow.³ Governments seeking to make the most of highly skilled nonimmigrants and immigrants face the challenge of identifying, attracting, and retaining those with the best prospects for success.⁴

B. Proposed Rule

On May 12, 2014, DHS published a proposed rule in the Federal Register at 79 FR 26870, proposing to:

- Clarify that principal E-3 and H-1B1 nonimmigrants are authorized to work for the specific employer listed in their petition without requiring separate approval for work authorization from USCIS (8 CFR 274a.12(b)(25) and 8 CFR 274a.12(b)(9));
- Authorize continued employment authorization for CW-1, principal E-3, and H-1B1 nonimmigrants with pending, timely filed extension of stay requests (8 CFR 274a.12(b)(20));
- Update the regulations describing the filing procedures for extension of stay and

² See White House, Building a 21st Century Immigration System, May 2011, at 3 and 9, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

³ See White House, Building a 21st Century Immigration System, May 2011, at 1, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf.

⁴ See Demetrios G. Papademetriou and Madeleine Sumption, Attracting and Selecting from the Global Talent Pool, Policy Challenges, Migration Policy Inst., Sept. 2013, at 4, available at <http://www.migrationpolicy.org/research/attracting-and-selecting-global-talent-pool-%E2%80%94-policy-challenges>.

change of status requests to include the principal E-3 and H-1B1 nonimmigrant classifications (8 CFR 214.1(c)(1) and 8 CFR 248.1(a)); and

- Allow a petitioner who wants to employ an EB-1 outstanding professor or researcher to submit evidence comparable to the evidence otherwise described in 8 CFR 204.5(i)(3)(i), which may demonstrate that the beneficiary is recognized internationally as an outstanding professor or researcher.

C. Final Rule

Consistent with the vision of attracting and retaining foreign workers, this final rule removes unnecessary obstacles for principal E-3 and H-1B1 highly skilled workers and CW-1 nonimmigrant workers to continue working in the United States, and for EB-1 outstanding professors and researchers to seek admission as immigrants. For example, under current regulations, H-1B1, CW-1, and principal E-3 nonimmigrants are not included in the regulations that authorize continued employment while a timely filed extension of stay request is pending. The regulations at 8 CFR 274a.12(b)(20) authorize foreign nationals in specific nonimmigrant classifications to continue employment with the same employer for a 240-day period beyond the authorized period specified on the Arrival-Departure Record, Form I-94, as long as a timely request for an extension of stay is filed. This means that these individuals can continue to work with the specific employer listed in their petition, even after their authorized stay expires, as long as their extension of stay request is still pending. Because Congress created the E-3, H-1B1, and CW-1 nonimmigrant classifications after 8 CFR 274a.12(b)(20) was effective, these nonimmigrant workers are not included in this provision and cannot continue to work with the same employer beyond the existing authorization while waiting for USCIS to

adjudicate an extension of stay request. DHS is amending its regulations at 8 CFR 274a.12(b)(20) to give H-1B1, CW-1, and principal E-3 nonimmigrants the same treatment as other, similarly situated nonimmigrants, such as H-1B, E-1, and E-2 nonimmigrants.

Moreover, E-3 and H-1B1 nonimmigrants are not listed in the regulations describing the filing procedures for extension of stay and change of status requests. Although the form instructions for H-1B1 and principal E-3 extension of stay and change of status requests (Instructions for Petition for a Nonimmigrant Worker, Form I-129) were updated to include H-1B1 and principal E-3 nonimmigrants when these categories were first established, the regulations were not. In this final rule, DHS is amending the regulations to add H-1B1 and principal E-3 nonimmigrants to the list of nonimmigrants that may extend their stay or change their status in the United States.

In addition, current regulations do not designate H-1B1 nonimmigrants and principal E-3 as authorized to accept employment with a specific employer incident to status, although such nonimmigrants are so authorized by statute. See INA section 212(t)[1st], 8 U.S.C. 1182(t)[1st], (noting the statutory requirements an employer must fulfill to petition for an H-1B1 or E-3 nonimmigrant); see also INA sections 101(a)(15)(E)(iii), 8 U.S.C. 1101(a)(15)(E)(iii), 101(a)(15)(H)(1)(b)(1), 8 U.S.C. 1101(a)(15)(H)(1)(b)(1), and 214(g)(8)(C), 8 U.S.C. 1184(g)(8)(C) (requiring “intending employers” of certain H-1B1 nonimmigrants to file an attestation with the Secretary of Labor). The E-3 and H-1B1 nonimmigrant classifications were established by statute in 2005 and 2003, respectively. See REAL ID Act of 2005, Public Law 109-13, section 501, 119 Stat. 231; United States-Singapore Free Trade Agreement Implementation Act,

Public Law 108-78, section 402, 117 Stat. 948 (2003); United States-Chile Free Trade Agreement Implementation Act, Public Law 108-77, sections 402-404, 117 Stat. 909 (2003). Since that time, the DHS employment authorization regulations at 8 CFR 274a.12 have not been updated to include principal E-3 and H-1B1 nonimmigrants as foreign nationals authorized to accept employment with a specific employer, incident to status, in the United States as designated by statute.

Finally, the language of the current EB-1 regulations for outstanding professors and researchers may not fully encompass other types of evidence that may be comparable, such as evidence that the professor or researcher has important patents or prestigious peer-reviewed funding grants. In this final rule, DHS is modifying the regulations describing permissible initial evidence for outstanding professors and researchers to allow a petitioner to submit evidence that is comparable to the currently accepted evidence listed in 8 CFR 204.5(i)(3)(i) to demonstrate that such beneficiaries are recognized internationally as outstanding in their academic areas. See INA section 203(b)(1)(B), 8 U.S.C. 1153(b)(1)(B). A petitioner may submit such evidence instead of, or in addition to, the currently accepted evidence described under 8 CFR 204.5(i)(3)(i), as long as the petitioner establishes that the evidence is comparable to those listed under 8 CFR 204.5(i)(3)(i)(A)-(F) and the standards in 8 CFR 204.5(i)(3)(i) do not readily apply. This change provides greater flexibility for outstanding professors and researchers because the petitioner will no longer be limited to the list of initial evidence. Finally, these changes will further the goal of removing unnecessary obstacles for these workers to seek admission to the United States as an immigrant.

In preparing this final rule, DHS considered all the public comments received and all other materials contained in the docket. This final rule adopts the regulatory amendments set forth in the proposed rule without substantive change. The rationale for the proposed rule and the reasoning provided in its background section remain valid with respect to these regulatory amendments. Section II.B above and this section each describe the changes that are the focus of this rulemaking. This final rule does not address a number of comments that DHS considered beyond the scope of this rulemaking because the comments requested changes to the regulations that DHS had not proposed and that commenters could not have reasonably anticipated that DHS would make. Such comments include suggestions for expanding premium processing services and for providing expedited processing for certain family-based petitions, travel while an application for an adjustment of status is pending, re-entry permits, translations, grace periods, specific comments in reference to another DHS rulemaking⁵, numerical per-country limits, obligations to hire U.S. citizens first, or questions on a variety of CNMI-specific topics (for example, changes to CW-1 validity periods, CW-1 reentry permits, the reduction of CW-1 nonimmigrant workers, changes to USCIS processing of petitions for CW-1 workers, and suggestions for waivers of occupational certifications). Although DHS has carefully reviewed each of these comments, DHS considers these comments to be out-of-scope for the reasons stated, and will not take further action on these comments in connection with this specific rulemaking proceeding. All comments and other docket material are available for viewing at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2012-0005.

⁵ These comments were forwarded to the appropriate docket and considered, as appropriate, in drafting the relevant regulation.

III. Public Comments on the Proposed Rule

A. Summary of Public Comments

In response to the proposed rule, DHS received 38 comments during the 60-day public comment period. Commenters included individuals, employers, workers, attorneys, nonprofit organizations, and one business organization.

While opinions on the proposed rule varied, a clear majority of the commenters supported the proposed changes in the rule. Specifically, supporters of the proposed rule welcomed the proposed employment authorization changes for principal E-3, H-1B1, and CW-1 nonimmigrants; the proposed update to the regulations clarifying the application requirements for E-3 and H-1B1 nonimmigrants requesting changes of status or extensions of stay; and the comparable evidence provision for EB-1 outstanding professors and researchers. Several commenters supported the comparable evidence provision and suggested additional evidence for DHS to consider when evaluating eligibility for EB-1 outstanding professors and researchers. Overall, the commenters supported DHS's efforts to harmonize the regulations to benefit highly skilled workers and CW-1 nonimmigrant workers and to remove unnecessary hurdles that place such workers at a disadvantage when compared to similarly situated workers.

Some commenters stated general opposition to the proposed rule, but did not offer any specific alternatives or suggestions relating to the proposals outlined in this rulemaking. Another commenter stated that the changes proposed with respect to EB-1 outstanding professors and researchers would be insufficient, and proposed a "point based system" instead.

DHS has reviewed all of the public comments received in response to the proposed rule, and responds to the issues raised by the comments below. The DHS responses are organized by subject area.

B. General Comments

1. Support

Multiple commenters provided general support for all the proposed changes in rule. One supporter stated that the proposed regulatory amendments will benefit many nonimmigrants. Another supporter indicated that the proposed changes will add to the much-needed math, science, and technology pool of workers in the United States. One commenter noted the need for regulatory action in order to attract and retain workers, and supported the ongoing efforts to harmonize the rules that are applicable to similarly situated visa categories and bring them in line with actual agency practice. This same commenter added that the proposed changes will provide uniformity and predictability for U.S. employers and their employees and will enhance compliance at virtually no cost to DHS. Another commenter also underscored the importance of removing unnecessary regulatory barriers to improve the ability of U.S. higher education institutions to attract and retain talented and sought-after professionals. Some commenters supported the changes, but did not discuss perceived benefits. One commenter requested DHS to finalize the rule quickly.

2. Oppose

One commenter expressed general opposition to this rulemaking, but did not cite any specific provision or offer any specific alternatives or suggestions relating to the proposals outlined in this rulemaking. Another commenter opposed having temporary

worker programs, in general, but did not offer any specific alternatives that would fall within the scope of this rule. DHS has not changed the final rule in response to these comments.

C. Employment Authorization for E-3 and H-1B1 Nonimmigrants

1. Employment authorization incident to status with a specific employer

Three commenters supported the proposal to add the H-1B1 and principal E-3 classifications to the list of nonimmigrants authorized to work incident to status with a specific employer. They stated that the proposed change reflects the current practice, which allows work authorization based on approval of the [nonimmigrant] classification, but does not require a separate application for employment authorization. Therefore, the proposed change will produce consistency between current practice and regulatory language.

One commenter recommended that DHS amend the regulations to list B-1 nonimmigrant household employees in 8 CFR 274a.12(b) as authorized for employment with a specific employer incident to status. The commenter also recommended that DHS amend 8 CFR 274a.12(a) to include spouses of L-1, E-1, and E-2 nonimmigrants in the categories of individuals who are authorized for employment incident to status. DHS has determined that expansion of employment authorization beyond the classifications identified in the proposed rule is not appropriate at this time, and it has therefore not included such an expansion in this final rule. DHS did not provide notice to the public or invite public comment on proposals to make changes to current employment authorization policies and procedures affecting these classes of nonimmigrants. For these

reasons, DHS is not including the recommended expansion of 8 CFR 274a.12(a) or 8 CFR 274a.12(b) for these particular nonimmigrants in this final rule.

DHS appreciates commenters' support for the proposal to add the H-1B1 and principal E-3 classifications to the list of nonimmigrants authorized to work incident to status with a specific employer. The INA describes the employment of E-3 and H-1B1 nonimmigrants with a specific, petitioning employer as the very basis for their presence in the United States. See INA section 101(a)(15)(E)(iii), 8 U.S.C. 1101(a)(15)(E)(iii); INA section 101(a)(15)(H)(i)(b1), 8 U.S.C. 1101(a)(15)(H)(i)(b1). Similarly situated nonimmigrants, such as H-1B nonimmigrants, are classified in the regulations as employment authorized incident to status with a specific employer. See, e.g., 8 CFR 274a.12(b)(9). However, after statutory enactment of the E-3 and H-1B1 nonimmigrant categories, the provisions in 8 CFR 274a.12(b) were not updated to include principal E-3 and H-1B1 nonimmigrants. Therefore, in this final rule, DHS will update its regulations and adopt, without change, the proposed provision adding principal E-3 and H-1B1 nonimmigrants to the list of nonimmigrants authorized to work for the specific employer listed in their petition. Specifically, DHS is adding a new provision at 8 CFR 274a.12(b)(25) to include principal E-3 nonimmigrants in the list of foreign nationals who are employment authorized incident to status with a specific employer. DHS is also amending 8 CFR 274a.12(b)(9) to include the H-1B1 nonimmigrant classification as employment authorized incident to status with a specific employer.

2. Continued employment authorization while a timely extension of stay request is pending

DHS received multiple comments regarding the provision authorizing the continued employment of principal E-3 and H-1B1 nonimmigrants. Most of these comments supported the provision to authorize the continued employment for E-3 and H-1B1 nonimmigrants with timely filed, pending extension of stay requests. One commenter explained that while employers file extension requests several months prior to the expiration of the workers' nonimmigrant status, unexpected processing delays can prevent the extension requests from being approved before such status expires. In turn, the nonimmigrant employees must stop working, causing serious disruptions to both the employers and their nonimmigrant workers. The commenters further stated that the current lack of continued work authorization results in lost wages to employees and loss in productivity to employers. The commenters noted that the continued employment authorization period, which may last up to 240 days, will protect against such interruptions by ensuring that U.S. employers who employ individuals in the E-3 and H-1B1 nonimmigrant classifications experience as little disruption as possible in the employment of their workers. These commenters therefore welcomed the proposed continued employment authorization because it will minimize disruption to employers and thereby promote economic growth. These commenters also supported the continued employment authorization proposal because it would harmonize the regulations applicable to E-3 and H-1B1 nonimmigrants with regulations applicable to similarly situated nonimmigrants. For example, one of these commenters noted that this change would allow colleges and universities to treat their similarly situated employees in a fair and consistent manner. One of these commenters also stated that the proposed change would substantially aid in attracting and retaining these workers.

Additionally, one commenter supported the proposed E-3 continued work authorization because comparable eligibility for continued work authorization for H-1B nonimmigrants has been extremely helpful in allowing the commenter's current tenure-track H-1B faculty, researchers, and staff to continue employment while USCIS is processing H-1B extension requests, and would permit similarly situated E-3 employees the same benefit. DHS appreciates the support from the public for this proposed provision. The potential gap in work authorization from unanticipated processing delays can burden both employers and employees alike. DHS also believes it is important to provide employers of H-1B1 and E-3 nonimmigrants the benefits that accrue from the predictability that currently is available to employers of nonimmigrants in similar employment-based nonimmigrant classifications, who file timely requests for extensions of stay with the same employers. Therefore, DHS has determined that it will adopt this provision without change, thereby automatically extending employment authorization to principal E-3 and H-1B1 nonimmigrants with timely filed, pending extension of stay requests.

One commenter recommended expanding the 240-day rule to cover Q-1 nonimmigrants. The commenter stated that, as with other nonimmigrant classifications, government error can delay approval, leading to serious business disruptions to the employer and adverse consequences to the workers through no fault of their own.

DHS has determined that expansion of continued employment authorization beyond the classifications identified in the proposed rule is not appropriate at this time, and it has therefore not included such an expansion in this final rule. This suggestion is outside the scope of this rulemaking, which did not make any proposals or invite public

comment with respect to Q-1 nonimmigrants. Therefore, in this final rule, DHS will update its regulations at 8 CFR 274a.12(b)(20) and adopt, without change, the proposed provision to authorize continued employment authorization for principal E-3 and H-1B1 nonimmigrants with pending, timely filed extension of stay requests.

D. Employment Authorization for CW-1 Nonimmigrants While a Timely Filed Extension of Stay Request is Pending

Six commenters supported the provision for automatic employment authorization for CW-1 nonimmigrant workers with timely filed, pending extension of stay requests. One commenter explained that while employers file extension requests several months prior to the expiration of the workers' nonimmigrant status, unexpected processing delays can prevent the extension requests from being timely approved and cause serious disruptions to employers and nonimmigrants. Another commenter remarked that current adjudication delays for CW-1 nonimmigrant workers are burdensome on the beneficiaries and on the local economy, and therefore urged DHS to adopt the proposed continued work authorization provision for CW-1 nonimmigrant workers. Commenters commonly stated that the potential lack of work authorization due to a processing delay results in serious disruption to both an employer's business and to the employee's life. The commenters noted that the 240-day continued employment authorization would protect against such interruptions by ensuring that U.S. employers of CW-1 nonimmigrants experience minimal disruption in the continued employment of their workers. One commenter stated that this proposed change would alleviate fear among employers and workers of interruptions in employment resulting from a lack of continued work authorization. Finally, one commenter stated that the proposed change would

provide equity for CW-1 nonimmigrants by ensuring that they are afforded the same treatment as other similarly situated individuals.

DHS appreciates the support from the public for this proposed provision. The disruption of employment can create a burden for both employers and employees. As a matter of equity, it is also important to ensure that CW-1 nonimmigrants who are waiting for USCIS to adjudicate their extension of stay requests with the same employer also benefit from the continued employment authorization available to other CW-1 nonimmigrants who change employers or an employee under the previous CNMI immigration system. Current regulations for the continued employment of CW-1 nonimmigrant workers are also inconsistent. Specifically, the regulations currently only provide continued work authorization for CW-1 nonimmigrant workers seeking to change to a new employer, including a change in employer resulting from early termination, and not to CW-1 nonimmigrants seeking an extension of stay with the same employer. 8 CFR 214.2(w)(7). This disparity may serve as an incentive for CW-1 nonimmigrant workers to change employers just to maintain continued employment authorization, which will inconvenience the CW-1 nonimmigrant worker's current employer who might lose the worker to another employer.

One commenter strongly supported this proposed change and noted that various employers previously sought to have a continuing work authorization provision included in the initial CW regulations without success. The commenter stated that the DHS response to this request then was that such provision was not authorized by the CNRA.⁶

⁶ See Public Law 110-229, 122 Stat. 754, 853 (2008). Title VII of the CNRA (codified, in relevant part, at 48 U.S.C. 1806(d)) extends U.S. immigration laws to the CNMI.

DHS notes that the interim rule amending 8 CFR 214.2(w) to create the CW classification published on October 27, 2009, and provided a 30-day comment period.⁷ On December 9, 2009, DHS published a notice in the Federal Register reopening and extending the public comment period for an additional 30 days.⁸ The commenter did not indicate whether the commenter submitted the suggestion for the continued employment authorization provision in response to either of those comment periods. However, DHS did receive post-publication correspondence requesting continued employment authorization for workers with pending extensions.⁹ DHS responded to these post publication correspondence by stating that CW-1 nonimmigrants do not have continuing employment authorization while an extension of stay petition is pending. In that correspondence, DHS noted that it was not in the position to provide such authorization without a change to the applicable regulations.¹⁰ Although DHS believes that its implementing CW regulations are consistent with congressional intent, it subsequently proposed improvements to the regulations to permit continued employment authorization during an extension of stay request through this notice and rulemaking, pursuant to its authority under the INA and the CNRA to implement such regulations.¹¹

⁷ See Commonwealth of the Northern Mariana Islands Transitional Worker Classification, 74 FR 55094 (Oct. 27, 2009).

⁸ See Commonwealth of the Northern Mariana Islands Transitional Worker Classification; Reopening the Public Comment Period, 74 FR 64997 (Dec. 9, 2009).

⁹ See Joint Letter to Alejandro Mayorkas, USCIS Director, from the Saipan Chamber of Commerce, the Hotel Association of the Northern Mariana Islands and the Society for Human Resource Management CNMI (Dec. 20, 2012).

¹⁰ See Letter from Alejandro Mayorkas, USCIS Director, to the Saipan Chamber of Commerce (March 7, 2013).

¹¹ See Section 102 of the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 112, and INA 103(a), 8 U.S.C. 1103(a) (authorizes the Secretary to administer and enforce the immigration and nationality laws); INA 214(a), 8 U.S.C. 1184(a) (authorizes the admission of nonimmigrants under such conditions as the Secretary may prescribe by regulation); INA 274A(h)(3)(B) (recognizes the Secretary's authority to extend employment to individuals who are not citizens or nationals of the United States); Public Law 110-229, 122 Stat. 754, 853 (2008) (extending U.S. immigration laws to the CNMI).

One of the commenters also supported the proposed change because it will help both employers and employees in the CNMI by providing employers with more time to file extension requests and by allowing employees to remain in lawful work-authorized status while awaiting the adjudication of the extension requests filed on their behalf. DHS appreciates the support for the continued work authorization provision for CW-1 nonimmigrants. The regulatory changes aim to provide both the employer and employee with continued employment when an employer files a timely request for an extension of stay for the CW-1 nonimmigrant worker. However, this new provision does not change the filing requirements or allot more time for employers to file extension requests. Under 8 CFR 214.2 (w)(12)(ii), an employer may file up to 6 months before it actually needs the employee's services, and this rulemaking does not change this filing requirement. Instead, this rulemaking provides a mechanism that automatically extends employment authorization, for a period of up to 240 days, while the employer's timely filed, extension of stay request remains pending.

One commenter proposed allowing an employee who transfers to another employer to continue to work pending the adjudication of the new petition with the prospective employer. DHS's proposed rule did not suggest continued work authorization for CW-1 nonimmigrant workers seeking a change of employment because DHS regulations already allow continued work authorization for changes of employment so long as certain requirements are met. As described above, under 8 CFR 214.2(w)(7), a CW-1 nonimmigrant worker may work for a prospective new employer after the prospective employer files a non-frivolous Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, for new employment. The employer must file the

petition for new employment to classify the alien as a CW-1 nonimmigrant, before the CW-1 nonimmigrant worker's authorized period of stay expires. The CW-1 nonimmigrant worker must not have worked without authorization in the United States since being admitted. If the petitioner and CW-1 nonimmigrant worker meet these conditions, then employment authorization will continue until DHS adjudicates the new petition.

One commenter proposed allowing a terminated employee to continue to work without interruption, subject to certain conditions. DHS's proposed rule did not suggest continued work authorization for terminated CW-1 nonimmigrant workers because USCIS regulations already allow for continued work authorization for terminated CW-1 nonimmigrant workers under certain circumstances. Under 8 CFR 214.2(w)(7)(v), a terminated CW-1 nonimmigrant worker who has not otherwise violated the terms and conditions of his or her status may work for a prospective new employer after the prospective employer files a non-frivolous Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I-129CW, for new employment. However, the new employer must file the Petition for a Nonimmigrant Worker, Form I-129CW, within a 30-day period after the date of termination. Employment authorization then continues until DHS adjudicates the new petition.

While the commenters supported the continued employment authorization for CW-1 nonimmigrant workers, they also offered specific suggestions regarding various aspects of the CW-1 transitional worker program. One commenter remarked that the continued work authorization provision merely provides a temporary solution to meet the needs of the local investors, and that a permanent immigration status is necessary. The

commenter encouraged the immediate passage of U.S. Senate bill S. 744 as a permanent solution to this CNMI foreign worker situation. Another commenter suggested that foreign workers in the CNMI should be provided with a “better” immigration status. The rulemaking focused on continued employment authorization for certain CW-1s with timely filed extension of stay requests. The CW program as a whole was not a subject of this rulemaking. These comments are outside the scope of this rulemaking.

DHS has determined that it will adopt this provision without change, thereby automatically extending employment authorization to CW-1 nonimmigrants who have timely filed, pending extension of stay requests for the same employer. Specifically, DHS will add the CW-1 nonimmigrant classification to the list of employment-authorized nonimmigrant classifications, at 8 CFR 274a.12(b)(20), that receive an automatic extension of employment authorization of up to 240 days while the employer’s timely filed extension of stay requests remain pending. This will ensure that the CW nonimmigrants are permitted continued employment authorization based on both pending change of employers requests and pending extension of stay requests.

E. Application Requirement for E-3 and H-1B1 Nonimmigrants Requesting Changes of Status or Extensions of Stay

DHS only received one comment on the proposal to add principal E-3 and H-1B1 nonimmigrants to the list of nonimmigrant classifications that must file a petition with USCIS to request an extension of stay or change of status. The commenter stated that the proposed changes, if adopted, will go far to enable initial and uninterrupted continued employment of H-1B1 and E-3 nonimmigrants. The commenter added that the changes create equity for these nonimmigrant categories as compared to other similar

nonimmigrant categories for specialty workers. For reasons previously stated, DHS will adopt this provision without change. Specifically, DHS will amend 8 CFR 214.1(c)(1) and 8 CFR 248.3(a) to add the E-3 and H-1B1 nonimmigrant classifications to the list of nonimmigrant classifications that must file a petition with USCIS to request an extension of stay or change of status. This updates the regulations so they conform to the filing procedures described in the form instructions.

F. Comparable Evidence for EB-1 Outstanding Professors and Researchers

DHS received a number of comments on the proposal to expand the current list of initial evidence for EB-1 outstanding professors and researchers to allow petitioners to submit evidence comparable to the other forms of evidence already listed in 8 CFR 204.5(i)(3)(i).

1. Support

Most of the commenters on the EB-1 comparable evidence provision supported it, for a variety of reasons. They cited the perceived positive effects on the United States, the need for harmonization of the regulations, and the need to submit evidence to allow beneficiaries to fully document their accomplishments. DHS notes that the same commenters remarked on more than one aspect of the comparable evidence provision.

Specifically, commenters remarked that the change would positively affect the United States in a variety of ways. Two commenters noted that the comparable evidence provision would expand the number of individuals eligible for this classification and would benefit the United States as a whole. Some commenters noted that the comparable evidence provision will improve the ability of U.S. employers, especially higher education employers, to attract, recruit, and retain talented foreign professors,

researchers, and scholars. One of these commenters added that this regulatory change will improve the capability to recruit and retain talented individuals which conduct the research that allows U.S. businesses to develop and sell products. This improved capability to recruit these individuals will help the U.S. economy's growth. Another commenter added that refining the EB-1 outstanding professors and researchers evidentiary list would benefit the United States by boosting research, innovation, and development.

DHS appreciates the commenters' support for the comparable evidence provision based on the perceived positive effects on United States' competitiveness and the Nation's economy. DHS agrees with the commenters that the proposed comparable evidence provision may also help U.S. employers recruit EB-1 outstanding professors and researchers.

A number of commenters supported expansion of the current list of evidentiary criteria for EB-1 outstanding professors and researchers to allow the submission of comparable evidence because it would harmonize the EB-1 outstanding professor and researcher regulations with those of other comparable employment-based immigrant classifications, eliminating unwarranted disparities with respect to these policies. Commenters emphasized that the proposed comparable evidence provision in turn would bring the criteria for proving eligibility for the outstanding professors and researchers classification in line with those that have long been permitted for other preference categories such as EB-1 aliens of extraordinary ability and EB-2 aliens of exceptional ability. These commenters stated that the proposed change is a logical extension of the existing regulatory provision listing the evidentiary criteria for EB-1 outstanding

professors and researchers, especially since the similarly situated EB-1 extraordinary ability classification, which requires satisfaction of a higher evidentiary threshold, allows for consideration of comparable evidence.¹²

DHS appreciates commenters' support for the comparable evidence provision based on the harmonization of the comparable regulations. DHS agrees that by allowing for the submission of comparable evidence, DHS will bring the evidentiary standards of the EB-1 outstanding professor and researcher category in line with those currently available to individuals qualifying under both the EB-1 extraordinary ability and EB-2 exceptional ability categories. This change in turn will provide equity for EB-1 outstanding professors and researchers with other similarly situated individuals. This change better enables petitioners to hire outstanding professors and researchers by providing a set of standards that are flexible enough to comprehensively encompass all evidence that may demonstrate their satisfaction of the statutory standard. DHS notes that although it is expanding the types of evidence that a petitioner may submit to establish eligibility, this rulemaking does not change the petitioner's burden to establish eligibility under the preponderance of the evidence standard of proof.

A number of commenters supported expanding the criteria for EB-1 outstanding professors and researchers because doing so would remove evidentiary limitations and allow employers to present full documentation of an employee's qualifications. One of these commenters added that the language in the proposed rule was well drafted and

¹² The regulatory text stating when comparable evidence may be submitted uses the term "standards" when referring to the list of evidence that may be submitted to establish eligibility. See, e.g., 8 CFR 204.5(h)(4) and 8 CFR 204.5(k)(3)(iii). Commenters, however, commonly used the term "criteria" or "criterion" when referring to the "comparable evidence" provisions and when responding to DHS's proposal to allow petitioners to submit evidence comparable to the other forms of evidence already listed in 8 CFR 204.5(i)(3)(i).

broad enough to include all evidence that may prove outstanding achievement. Under current regulation, petitioners need to fit evidence into specific evidentiary categories. For example, petitioners have submitted funding grants as documentation of major awards under 8 CFR 204.5(i)(3)(i)(A). In other instances, petitioners may have omitted relevant evidence that could have helped to demonstrate the beneficiary is recognized internationally as outstanding, such as high salary and affiliation with prestigious institutions, because they did not believe it would fit into any of the regulatory evidentiary category. Commenters noted that the proposed change adds necessary flexibility; for instance, this change will now potentially allow for the submission of important patents, grant funding and other such achievements that may not neatly fall into the previously existing evidentiary categories. Two of these commenters also commended DHS for recognizing that the types of evidence relevant to the determination of eligibility for this classification have changed greatly since these evidentiary criteria were first created, and will continue to evolve over time due to the changing needs of American businesses.

One of the commenters that supported the comparable evidence provision also expressed concern regarding how USCIS considers comparable evidence. The commenter reported that recent decisions in other employment-based categories suggest that adjudicators allow comparable evidence only when none of the listed criteria apply. The commenter added that comparable evidence should be presumed acceptable, regardless of whether any of the otherwise enumerated criteria apply, as long as the evidence is relevant to the merits of the case. This commenter urged DHS to clarify this

approach here, as well as with certain employment-based classifications where comparable evidence is currently in use.

DHS appreciates the commenter's concern regarding adjudicative trends in how USCIS considers comparable evidence. DHS regulations provide that petitions in the EB-1 extraordinary ability and EB-2 exceptional ability classifications must establish that one or more permissible standards are not readily applicable to the beneficiary's occupation in order to rely on the comparable evidence provision respective to those standards. See 8 CFR 204.5(h)(4), (k)(3)(iii). Accordingly, if any single evidentiary standard is inapplicable to the beneficiary's occupation, the petitioner may submit alternative, but comparable, evidence even though other standards may be applicable to the beneficiary's occupation.

For EB-1 outstanding professors and researchers, DHS confirms that a petitioner will be able to submit comparable evidence instead of, or in addition to, evidence targeted at the standards currently listed in 8 CFR 204.5(i)(3)(i) to demonstrate that the beneficiary is internationally recognized as outstanding if the currently listed standards do not readily apply. The intent of this provision is to allow petitioners, in cases where evidence of the beneficiary's achievements do not fit neatly into the enumerated list, to submit alternate, but qualitatively comparable, evidence. Under this provision, a petitioner may submit evidence falling within the standards listed under 8 CFR 204.5(i)(3)(i), and may also use the comparable evidence provision to submit additional types of comparable evidence that is not listed, or that may not be fully encompassed, in 8 CFR 204.5(i)(3)(i). DHS notes that a petitioner's characterization of existing standards as "not readily applying" to the submitted evidence will be considered in the totality of

the circumstances, but USCIS ultimately will determine which standard is satisfied, if any, by any form of submitted evidence.

As noted in the proposed rule, limiting submission of comparable evidence for outstanding professors and researchers only to instances in which the standards do not readily apply “to the alien’s occupation” would not adequately serve the goal of this regulatory change because unlike the standards for EB-1 aliens of extraordinary ability and EB-2 aliens of exceptional ability, the standards for EB-1 outstanding professors and researchers are tailored to only these two occupations.¹³ Thus, a petitioner for an outstanding professor or researcher does not need to establish that a particular standard is not readily applicable “to the beneficiary’s occupation” before they can rely on comparable evidence. A petitioner for an outstanding professor or researcher instead needs to establish that the evidentiary standards listed in 8 CFR 204.5(i)(3)(i) do not readily apply to the evidence that the petitioner proposes to submit before the petitioner can rely on the comparable evidence provision.

After establishing that the evidentiary standards listed in 8 CFR 204.5(i)(3)(i) does not readily apply to the evidence he or she is submitting, the petitioner may then submit alternative, but qualitatively comparable evidence for those standards. The existing evidentiary standards listed in 8 CFR 204.5(i)(3)(i) serve as a roadmap for

¹³ In the proposed rule, DHS explained that the aliens of extraordinary ability and aliens of exceptional ability classifications encompass a broad range of occupations (sciences, arts, education, business, or athletics for extraordinary ability aliens; and the sciences, arts, or business for exceptional ability aliens). See 79 FR 26870, 26880 (citing INA section 203(b)(1)(A), (2)(A)). Employers filing petitions under such classifications may submit comparable evidence if they can establish that the standards listed in the regulation do not directly apply to the beneficiary’s occupation. See 8 CFR. 204.5(h)(4), (k)(3)(iii). In contrast, the outstanding professor or researcher classification involves only two overarching types of occupations, and generally, the current evidentiary standards readily apply to both. Therefore, the variance between the regulatory text of comparable evidence provision for EB-1 outstanding professors and researchers and that provision for the other two categories is necessary.

determining, among other things, the quantity and types of evidence that should be submitted in order for such evidence to be considered “comparable.”

Given the overwhelming support and strong justification for the comparable evidence provision as proposed, DHS will adopt it and amend 8 CFR 204.5(i)(3) to include a comparable evidence provision.

2. Oppose

Two commenters opposed the comparable evidence provision for outstanding professors and researchers. One commenter indicated that they opposed it because it will expand the number of eligible foreign nationals competing for high-tech jobs. The commenter stated that many engineers, computer professionals and scientists are unemployed or under-employed and asserted that the proposed change would lead to two negative effects on U.S. workers: (1) the change will depress the wages of U.S. citizens; and (2) it will increase a sense of job instability and in turn deter workers from speaking up for fear of retaliation.

While the commenter did not submit data to support the wage and instability concerns, DHS takes these comments seriously. DHS appreciates this viewpoint and has carefully considered the potential for any negative effects on the labor market as a result of this rulemaking. Congress imposed a numerical limitation for the number of EB-1 visas available annually. The annual cap on EB-1 visas generally is set by statute at 40,000, plus any visas left over from the fourth and fifth employment based preference categories (special immigrants and immigrant investors) described in section 203(b)(4) and (5) of the INA, 8 U.S.C. 1153(b)(4) and (5). In FY 14, USCIS received 3,549 petitions for EB-1 outstanding professors and researchers. DHS notes that this provision

does not expand the visa numerical limitation beyond that set forth by Congress. Rather, DHS is simply expanding the list of evidentiary standards so that those who may be meritorious of classification under INA 203(b)(1)(B) can more readily demonstrate their eligibility, consistent with similar classifications. This provision provides greater flexibility for petitioners on what evidence they may submit to show that the beneficiary is recognized internationally as outstanding in the academic field specified in the petition. It does not change any of the remaining petitioning requirements (such as the job offer) or expand the types of individuals who can qualify for the EB-1 classification beyond those individuals authorized under the statute. Instead, this change better enables petitioners to hire outstanding professors and researchers by providing a set of standards that are flexible enough to encompass any evidence that may demonstrate that they are recognized internationally as outstanding.

Another commenter expressed concern regarding existing fraud and abuse in the H-1B and EB-1 programs, stating that the government should first focus on ways to prevent such abuse “before passing any law to ease the process” for these individuals. The commenter did not provide any data on the nature or extent of such fraud and abuse, and did not otherwise identify a connection between the proposed rule’s provisions and past instances of fraud and abuse. DHS takes concerns regarding fraud and abuse very seriously and has measures in place to detect and combat fraud. Strict consequences are already in place for immigration-related fraud and criminal activities, including inadmissibility to the United States, mandatory detention, ineligibility for naturalization, and removability. See, e.g., INA sections 101(f), 212(a)(2) & (a)(6), 236(c),

237(a)(1)(G) & (a)(2), 318; 8 U.S.C. 1101(f), 1182(a)(2) & (a)(6), 1226(c), 1227(a)(1)(G) & (a)(2), 1429.

Additionally, the USCIS Fraud Detection and National Security Directorate (FDNS) currently combats fraud and abuse, including in the H-1B and EB-1 programs, by developing and maintaining efficient and effective anti-fraud and screening programs, leading information sharing and collaboration activities, and supporting law enforcement and intelligence communities. FDNS's primary mission is to determine whether individuals or organizations filing for immigration benefits pose a threat to national security, public safety, or the integrity of the nation's legal immigration system. FDNS's objective is to enhance USCIS's effectiveness and efficiency in detecting and removing known and suspected fraud from the application process, thus promoting the efficient processing of legitimate applications and petitions. FDNS officers resolve background check information and other concerns that surface during the processing of immigration benefit applications and petitions. Resolution often requires communication with law enforcement or intelligence agencies to make sure that the information is relevant to the applicant or petitioner at hand and, if so, whether the information would have an impact on eligibility for the benefit. FDNS officers also perform checks of USCIS databases and public information, as well as other administrative inquiries, to verify information provided on, and in support of, applications and petitions. FDNS uses the Fraud Detection and National Security Data System (FDNS-DS) to identify fraud and track potential patterns.

USCIS has formed a partnership with U.S. Immigration and Customs Enforcement (ICE), in which FDNS pursues administrative inquiries into most

application and petition fraud, while ICE conducts criminal investigations into major fraud conspiracies. Individuals with information regarding fraud and abuse in the immigration benefits system are encouraged to contact FDNS at FDNS@dhs.gov or by mail at 111 Massachusetts Ave. N.W., Ste. 7002, Mail Stop 2280, Washington, DC 20529-2280. DHS believes that these collective measures provide adequate safeguards to ensure that fraud and abuse does not occur, and that this rulemaking is unlikely to result in a significant additional risk of fraud and abuse, because there is a lack of a connection between the proposed rule's provisions and past instances of fraud and abuse. Accordingly, DHS has not made any changes in response to these comments.

3. Suggestions for other Evidence

Six commenters suggested additional categories of evidence that DHS should consider accepting as comparable evidence or initial evidence. One commenter suggested that DHS accept the number of years of experience working in a research field and an offer of employment by a research organization or institute of higher education as comparable evidence to the various criteria See 8 CFR 204.5(i)(3). The commenter noted that certain researchers face hurdles in publishing groundbreaking results and are therefore unable to obtain the scholarly authorship, recognition, or requisite awards to meet this criterion. The commenter suggested that permitting this evidence would help these researchers meet the eligibility requirements for this classification.

One commenter suggested that DHS give priority to U.S. doctoral degree holders applying as outstanding researchers or professors who already have a tenure-track faculty position. The commenter explained that these individuals teach and conduct research in narrowly focused fields and are therefore not heavily cited. As a result, they are not

usually eligible for EB-1 positions because they cannot meet the existing criterion involving “published material in professional publications written by others” about the professor or researcher’s work. See 8 CFR 204.5(i)(3)(i)(C). The commenter stated that allowing more evidence to fit the criterion will help individuals in this type of scenario.

In general, three commenters suggested that DHS consider a U.S. earned doctoral degree as evidence to qualify for the EB-1 classification. Their comments varied in detail and scope. One commenter stated that DHS should grant the EB-1 classification to individuals who obtained their doctoral degrees from U.S. schools. This commenter did not provide any details or context to clarify this suggestion. Another commenter suggested that DHS should allow individuals with U.S. doctoral degrees in science, technology, engineering and mathematics (STEM) with a related job [offer] to qualify for the EB-1 category. DHS is unable to determine whether these commenters suggested an automatic grant of the classification based on a U.S. earned doctoral degree or if the commenter suggested that the classification be limited only to U.S. earned doctoral degree holders.

One of these commenters suggested that DHS expand the list of initial evidence to include a STEM doctoral degree issued by a U.S. accredited university, and that DHS could publish a list of U.S. accredited universities to make the criteria more transparent. The commenter explained that a petitioner could satisfy the proposed criteria by submitting an “attested copy”¹⁴ of the STEM degree certificate and an unopened

¹⁴ The commenter references the evidentiary requirements for the EB-2, Members of Professions Holding Advanced Degrees or Aliens of Exceptional Ability. The relevant provision at 8 CFR 204.5(k)(3)(i)(A) requires an “official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree.” Therefore, in this context, DHS infers that “attested copy” is a reference to “an official academic record.”

transcript from the university, to mirror the current criteria set forth for EB-2 petitions. The commenter added that this suggestion would provide a pathway for U.S. trained doctoral degree holders to stay in the United States, allowing the United States to retain technical excellence and continue its leadership in technology. The commenter also suggested that DHS could set parameters for eligibility criteria based on salary, and that a petitioner could satisfy this requirement by submitting occupational employment statistics from the Bureau of Labor Statistics (BLS). The commenter suggested that eligible EB-1 workers should have wages that are greater than the 75th percentile of the BLS wage figures for their occupation, such that beneficiaries making greater than \$100,000 a year would satisfy the criteria, a requirement the commenter believes would mirror the current criteria set forth for EB-1, Aliens of Extraordinary Ability.¹⁵ The commenter believes this suggestion would alleviate any concerns regarding financial exploitation of the immigrant worker and the protection of domestic workers' wage rights.

DHS carefully considered the commenters' suggestions for initial and additional evidence for the EB-1 outstanding professors and researchers classification. DHS believes that the evidence suggested in the comments above regarding minimum number of years of experience and minimum education requirements generally would not be beneficial in an analysis of whether an individual is internationally recognized as outstanding in his or her academic field. The purpose of the proposed comparable

¹⁵ The commenter references the evidentiary requirements for the EB-1, Aliens of Extraordinary Ability. The relevant provision at 8 CFR 204.5(h)(3)(ix) requires "evidence that the alien has commanded a high salary or other high remuneration for services, in relation to others in the field." In contrast, the evidentiary requirements for the EB-1, Outstanding Professors and Researchers, at 8 CFR 204.5(i)(3) does not contain a high salary criterion. DHS may consider any evidence submitted in the totality of the circumstances to determine whether an individual is internationally recognized as an outstanding professor or researcher.

evidence provision is to allow petitioners to present evidence that, although not on the enumerated list, may still serve to demonstrate that the professor or researcher is internationally recognized as outstanding. DHS appreciates that to achieve this goal, the standards listed in 8 CFR 204.5(i)(3)(i) need to have some measure of flexibility so they may continue to evolve over time in response to U.S. business needs and/or the changing nature of certain work environments or practices. It is not clear, however, whether the commenters' suggestions regarding minimum number of years of experience, minimum education requirements, and salary requirements are intended to limit or expand the current evidentiary criteria for EB-1 outstanding professors or researchers. If they were intended to limit the criteria, then the commenters' suggestions would have the effect of narrowing the eligibility criteria by requiring very specific evidence that is possessed by a specific subset of the potential population of outstanding professors and researchers. In direct contrast, the intended purpose of the comparable evidence provision is to provide flexibility for this population. If the commenter's suggestions, however, were intended to expand the type of evidence that may be considered, that suggestion is consistent with the purpose of the comparable evidence provision as it provides needed flexibility to establish eligibility. Therefore, DHS declines to adopt these suggestions as amendments to the standards listed in 8 CFR 204.5(i)(3)(i) in favor of a broad comparable evidence provision.¹⁶

One commenter expressed concern that adding the proposed comparable evidence provision will not improve the probability that an outstanding professor and researcher

¹⁶ Although DHS will not amend the regulations to add these very specific suggestions, please note that the comparable evidence provision is sufficiently broad to permit consideration of the evidence described in the comments, so long as the previously described requirements of the provision are satisfied.

will qualify for the classification. The commenter explained that adjudicators analyze this classification under a two-part analysis, and therefore meeting the criteria is not enough to prove eligibility. Instead, the commenter suggested that DHS impose a point-based system as an alternative, transparent method for evaluating whether these individuals are eligible for the classification. The commenter added that this would eliminate any subjectivity in the process and allow a researcher or petitioner to predict whether he or she meets or does not meet the criteria.

DHS disagrees with the commenter's assertion that the proposed comparable evidence provision will not benefit petitioners and these specific foreign workers. The stated purpose of the proposed comparable evidence provision is to allow petitioners to submit additional types of evidence and to fully document the beneficiary's international recognition as an outstanding professor or researcher in order to demonstrate eligibility for the requested classification. However, this proposal does not change the eligibility standard for this classification. The petitioner must still demonstrate, by a preponderance of the evidence, that the beneficiary is recognized internationally as outstanding in the specific academic area.

The commenter correctly asserted that adjudicators analyze this classification using a two-part approach. The USCIS policy memo, Evaluation of Evidentiary Criteria in Certain I-140 Petitions, provides instructions to adjudicators regarding application of a two-step analysis for purposes of adjudicating extraordinary ability, outstanding professor and researcher, and exceptional ability Form I-140 petitions.¹⁷ The commenter stated that

¹⁷ See USCIS Policy Memorandum, "Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14" (Dec. 22, 2010), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf>.

given this two-step analysis, a beneficiary may satisfy at least two of the outstanding professor and researcher regulatory standards but fail to prove eligibility. DHS believes that whether or not a beneficiary ultimately may prove eligibility by providing evidence satisfying at least two of the listed regulatory criteria is not a material question in considering whether to add this comparable evidence provision. Instead, by allowing submission and consideration of comparable evidence, which does not exist under current regulation, this rule promises to offer petitioners a more meaningful opportunity to establish a beneficiary's eligibility. Thus, although DHS recognizes that satisfaction of the newly added provision will not guarantee approval for the classification, if petitioners submit evidence that indeed is comparable and points to international recognition for being outstanding in the field, that evidence may improve the probability that the petition will be approved under the existing framework.

DHS appreciates the suggestion for an alternative framework for analysis of the EB-1 outstanding professors and researchers classification, but DHS declines to adopt the suggested point-based system as it would require a much broader reshaping of the current immigration system. This suggestion would require a wholesale rulemaking for all the other classifications, which is beyond the scope of this rulemaking.

DHS declines to adopt the suggestions for initial evidence, additional evidence, and an alternative framework. As previously noted, DHS is tailoring this regulation to provide EB-1 outstanding professors and researchers with a comparable evidence provision that mirrors the other employment-based immigrant categories that already allow for submission of comparable evidence.

G. Miscellaneous Comments

One commenter requested clarification as to whether the changes proposed in this rule would affect processing times for family immigration. The commenter did not state which aspects of the proposed changes he or she believes could impact family immigration processing times. While there is always a possibility that changes to one USCIS business process may trigger unanticipated downstream effects on other USCIS business processes, DHS does not anticipate that changes made by this rule will have a direct impact on family based immigration processing times.

Another commenter supported DHS's replacement of the more narrow term "employer" with the more general term "petitioner" in reference to who may file a request to change or extend status under 8 CFR 214.1(c)(1) and 248.3(a). The commenter explained that the term "employer" does not adequately describe the array of individuals and entities that may file petitions under 8 CFR 214.2 and the term "petitioner" is a much more accurate descriptor. DHS agrees that the term "petitioner" is a more accurate depiction of the individual who may file in a variety of scenarios. Additionally, this change will generally eliminate inconsistency between the change of status and extension of stay provisions and the classification-specific provisions in 8 CFR 214.2. This change will eliminate any confusion that the current inconsistency between these provisions may have caused. DHS will adopt this provision without change.

IV. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental,

public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB).

This analysis updates the estimated costs and benefits discussed in the proposed rule. This final rule will not impose any additional compliance costs on employers, individuals, or government entities, and will not require additional funding for the Federal Government. However, DHS notes that there could be additional familiarization costs as employers read the final rule in the Federal Register to understand the benefits that this rule will provide. Also, USCIS may spend a de minimis amount of time updating training materials, but USCIS does not expect to hire additional personnel as a result of this rule. The final rule will make certain changes to the regulations governing the E-3, H-1B1, and CW-1 nonimmigrant worker classifications. Specifically, DHS will amend the regulation to allow principal E-3, H-1B1, and CW-1 nonimmigrant workers up to 240 days of continued work authorization beyond the expiration date noted on their Arrival Departure Record, Form I-94, provided that their extension of stay request is timely filed. Employers or petitioners are already required to submit an extension of stay for such nonimmigrant classifications in order to extend their status beyond the expiration date noted on their Arrival Departure Record, Form I-94. Permitting continued employment while the extension of stay request is pending with USCIS places principal E-3, H-1B1, and CW-1 nonimmigrant workers on par with other, similarly situated nonimmigrants.

The provisions will not result in any additional compliance costs, burdens, or procedures for the U.S. employer or the workers.

Additionally, DHS will allow petitioners of EB-1 outstanding professors and researchers to submit comparable evidence, instead of or in addition to the evidence listed in 8 CFR 204.5(i)(3)(i), to demonstrate that the professor or researcher is recognized internationally as outstanding in his or her academic field. Allowing comparable evidence for EB-1 outstanding professors and researchers will match the evidentiary requirements with those of similarly situated employment-based immigrant classifications.

DHS notes that the above-referenced changes are part of DHS's Retrospective Review Plan for Existing Regulations under Executive Order 13563.¹⁸ During the development of DHS's Retrospective Review Plan for Existing Regulations in 2011, DHS received one comment in response to the 2011 publication.¹⁹ DHS received more comments again in response to the 2014 publication. These public comments requested specific changes to the DHS regulations that govern continued work authorization for principal E-3 and H-1B1 nonimmigrants when an extension of status petition is timely filed, and requested that DHS expand the types of evidence allowable in support of immigrant petitions for outstanding researchers or professors. This rule responds to these comments according to the retrospective review principles of Executive Order 13563.

The costs and benefits of the final rule are summarized in Table 2.

¹⁸ See U.S. Department of Homeland Security Retrospective Review of Existing Regulations – Progress Report (Feb. 2015), available at <http://www.dhs.gov/publication/february-2015-retrospective-review-plan-report> for the latest published update on DHS actions with respect to Retrospective Review.

¹⁹ See Letter from Marlene M. Johnson, Executive Director and CEO of NAFSA: Association of International Educators, to Ivan K. Fong, General Counsel, DHS (Apr. 13, 2011), available at <http://www.nafsa.org/uploadedFiles/DHSregreviewcommentApr122011%20public.pdf>.

Table 2 Summary of Costs and Benefits		
Costs	Change	Benefits and Avoided Costs
<p>Minimal costs associated with reading the rule to understand the benefits that will accrue to employers and workers. This rule does not impose any additional compliance costs.</p>	E3, H-1B1, and CW-1 Nonimmigrants	
	<p>Continued employment authorization of up to 240 days for an H-1B1, principal E-3, or CW-1 nonimmigrant worker while a timely filed extension of stay petition is pending.</p>	<p>Avoided cost of lost productivity for U.S. employers of principal E-3, H-1B1, and CW-1 nonimmigrant workers. Not quantified.</p>
		<p>Would provide equity for principal E-3 and H-1B1 nonimmigrants relative to other employment-based nonimmigrants listed in 8 CFR 274a.12.(b)(20) and provides equity for CW-1 nonimmigrant workers whose extension is filed by the same employer, similar to other CW-1 nonimmigrant workers who change employers. Qualitative benefit.</p>
	<p>Clarify that principal E-3 and H-1B1 nonimmigrants are work authorized incident to status, and specify current filing procedures for requesting change of status or extension of stay.</p>	<p>Ensures the regulations are consistent with statutory authority and codifies current practice.</p>
	EB-1 Outstanding Professor and Researcher Classification	
	<p>Allow the use of comparable evidence to that listed in 8 CFR 204.5(i)(3)(i)(A) – (F) to establish that the EB-1 professor or researcher is recognized internationally as outstanding in his or her academic field.</p>	<p>May help U.S. employers recruit EB-1 outstanding professors and researchers for U.S. employers. Not quantified.</p>
		<p>Would provide equity for EB-1 outstanding professors and researchers relative to certain employment-based immigrants listed in 8 CFR 204.5. Qualitative benefit.</p>

A summary of the classification types affected by this final rule is shown in Table 3.

Table 3 Summary of Affected Visa Types				
Visa Type	Beneficiary Restrictions	Immigration Status	Maximum Duration of Stay	Annual Limitations

E-3	Nationals of Australia	Nonimmigrant (temporary employment)	2 years, potentially indefinite extensions	10,500 ²⁰
H-1B1	Nationals of Chile or Singapore	Nonimmigrant (temporary employment)	1 year, potentially indefinite extensions	1,400 for Chilean nationals; 5,400 for Singaporean nationals
CW-1	Limited to workers in the CNMI during the transition to U.S. Federal immigration regulations	Nonimmigrant (temporary employment during transition period)	1 year, extensions available through December 31, 2019	Maximum of 12,999 in fiscal year (FY) 2016
EB-1 outstanding professor and researcher	Professors and researchers (any nationality) who are recognized internationally as outstanding in their academic area	Immigrant (permanent residence and employment)	None	Apportioned from the approximate 40,040 generally available annually to first preference employment-based immigrant visas

1. E-3 and H-1B1 nonimmigrant workers

Under current regulations, if employers of E-3 or H-1B1 nonimmigrants want to ensure continued employment authorization throughout the period that the extension request is pending, they generally must file a petition requesting the extension of the individual employee's stay well before the initial authorized period of stay expires. The Petition for a Nonimmigrant Worker, Form I-129, is used to request extensions of stay for these nonimmigrant workers. Currently, the petitioner may file a request for extension of stay as early as 6 months before the authorized period of stay expires. As of December

²⁰ In accordance with INA section 214(g)(11)(C), this limit only applies to principal E-3s and does not extend to spouses or children of the principal alien.

31, 2014, the average processing time for USCIS to adjudicate these extension requests is 2 months.²¹ However, if the principal E-3 or H-1B1 nonimmigrant worker's authorized period of stay expires before USCIS grants the extension request, the worker cannot continue to work while his or her extension request remains pending.

In this rule, DHS amends its regulations to permit principal E-3 and H-1B1 nonimmigrants to continue their employment with the same employer for up to 240 days after their authorized period of stay expires (as specified on their Arrival-Departure Record, Form I-94) while requests for extension of stay on their behalf are pending. To obtain authorization to continue employment for up to 240 days, employers or petitioners must timely file the Petition for Nonimmigrant Worker, Form I-129. Since employers are already required to file the Petition for Nonimmigrant Worker, Form I-129, in order to request an extension of stay on behalf of the nonimmigrant worker, there are no additional filing requirements or costs for employers or petitioners to comply with in this final rule. DHS notes there are minimal familiarization costs to employers associated with reading the rule in the Federal Register to understand the benefits of the rule. The benefits of the final rule will be to provide equity for principal E-3 and H-1B1 nonimmigrants relative to other employment-based nonimmigrants listed in 8 CFR 274a.12.(b)(20). Additionally, this provision may allow employers of principal E-3 and H-1B1 nonimmigrant workers to avoid the cost of lost productivity that results from interruptions of work while an extension of stay request is pending.

²¹ See USCIS Processing Time Information, available at <https://egov.uscis.gov/cris/processTimesDisplayInit.do>. The USCIS California Service Center and Vermont Service Center adjudicate Petition for a Nonimmigrant Worker, Form I-129, extension of stay requests for E and H-1B nonimmigrants.

Table 4 shows that USCIS received a total of 5,294 extension of stay requests for H-1B1 and principal E-3 nonimmigrant workers in the FYs from 2010 through 2014 (an average of 1,059 requests per year). USCIS approved 4,026 extensions of stay requests in the same period (an average of 805 per year). Extension of stay requests received and petition approvals are not meant for direct comparison because USCIS may receive a petition in one year but make a decision on it in another year.

Table 4. Petition for Nonimmigrant Worker, Form I-129 Filed for an Extension of Status for E-3 and H-1B1 Nonimmigrants						
	Petitions Received			Petitions Approved		
FY	H-1B1	E-3	Total	H-1B1	E-3	Total
2010	444	624	1,068	185	571	756
2011	438	555	993	220	410	630
2012	489	563	1,052	180	380	560
2013	417	590	1,007	411	622	1,033
2014	441	733	1,174	447	600	1,047
Total	2,229	3,065	5,294	1,443	2,583	4,026

Source: Data provided by USCIS Office of Performance and Quality (OPQ), January 2015.

USCIS does not have an estimate of either: (a) the number of cases where principal E-3 and H-1B1 nonimmigrants are unable to continue employment with their employer because their employer's timely petition for an extension of stay was not adjudicated before their authorized period of stay expired, or (b) how long principal E-3 and H-1B1 nonimmigrants were unable to work when their employer's timely petition for an extension of stay was not adjudicated before their authorized period of stay expired.²²

²² USCIS acknowledges that in part 3 of the Petition for a Nonimmigrant Worker, Form I-129, information is collected about the beneficiary that is currently in the United States. While this information is collected and considered for the purposes of adjudicating the petition, this information is not captured in a database.

Because of this data limitation, we are unable to quantify the total aggregate estimated benefits of this provision of the rule. The rule, however, will benefit U.S. employers to the extent that this rule allows U.S. employers to avoid interruptions in productivity that could result if the timely extension of stay is not adjudicated before the authorized period of stay expires, as noted on the nonimmigrant worker's Arrival Departure Record, Form I-94. Unfortunately, DHS did not receive statistics or data from impacted stakeholders that permit us to quantitatively estimate the benefits of this rule.

In addition, DHS is amending the regulations to codify current practices. Specifically, DHS is amending 8 CFR 274a.12(b) to clarify in the regulations that the principal E-3 and H-1B1 nonimmigrant classifications are employment authorized incident to status with a specific employer. DHS is also amending 8 CFR 214.1(c)(1) and 8 CFR 248.3(a) to add the principal E-3 and H-1B1 nonimmigrant classifications to the list of nonimmigrant classifications that must file a petition with USCIS to make an extension of stay or change of status request. Again, both of these regulatory clarifications are consistent with current practice.

2. CW-1 nonimmigrant workers

This provision of the final rule will apply to the CW-1 classification, which is issued solely to nonimmigrant workers in the CNMI. The CW-1 nonimmigrant visa classification was created to allow certain workers who are otherwise ineligible for any other nonimmigrant visa classification under the INA to work in the CNMI during the transition period to the U.S. Federal immigration system. This transition period was set to end on December 31, 2014. On June 3, 2014, the U.S. Secretary of Labor exercised

statutory responsibility and authority by extending the CW transitional worker program for an additional 5 years, through December 31, 2019.²³

CW-1 nonimmigrant workers may be initially admitted to the CNMI for a period of 1 year, and USCIS may grant extensions in 1-year increments until the end of the transition period. The CW-1 nonimmigrant visa classification is valid only in the CNMI and does not require any certification from the DOL.

DHS has determined that current regulations contain an inconsistency. While current regulations provide continued work authorization for CW-1 nonimmigrant workers while petitions for a change of employers are pending and for certain beneficiaries of initial CW transitional worker petitions filed on or before November 27, 2011, continued work authorization is not currently provided for CW-1 nonimmigrant workers requesting extensions of stay with the same employer. This inconsistency in the regulations may create an incentive for CW-1 nonimmigrant workers to change employers, as they would have the advantage of uninterrupted work authorization.

DHS is revising the regulations to allow for equitable treatment of CW-1 nonimmigrant workers who remain with the same employer by extending continued employment authorization for up to 240 days while a timely filed, pending request for an extension of stay with the same employer is being adjudicated. As with the similar proposal in this rule regarding H-1B1 and principal E-3 nonimmigrants, current employers of CW-1 nonimmigrant workers may also avoid productivity losses that could occur if a CW-1 nonimmigrant worker cannot continue employment while the timely filed extension request is pending.

²³ See Secretary of Labor Extends the Transition Period of the Commonwealth of the Northern Mariana Islands-Only Transitional Worker Program, 79 FR 31988 (June 3, 2014).

The CW-1 nonimmigrant classification is temporary. DHS has established numerical limitations on the number of CW-1 nonimmigrant classifications that may be granted (see Table 5). The numerical limitations apply to both initial petitions and extension of stay requests, including change of employer petitions, in a given FY. DHS has set the numerical limitation for CW-1 nonimmigrant workers at 12,999 for FY 2016.²⁴

Table 5 Numerical Limitations of CW-1 Classifications	
FY	Numerical Limit
2011	22,417
2012	22,416
2013	15,000
2014	14,000
2015	13,999
2016	12,999

Source: FYs 2011 and 2012, 8 CFR 214(w)(viii). FY 2013, Federal Register volume 77, no. 231, page 71287. FY 2014, Federal Register volume 78, no. 186, page 58867. FY 2015 Federal Register volume 79, no. 188, page 58241. FY 2016 Federal Register volume 80, no. 204, page 63911.

DHS set the numerical limit of CW-1 nonimmigrant workers at 14,000 for FY 2014 and petitioning employers filed initial petitions for 1,133 beneficiaries; extension of stay requests from the same employer for 8,952 beneficiaries; and extension of stay

²⁴ See Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker Numerical Limitation for Fiscal Year 2016, 80 FR 63911 (Oct. 22, 2015). On June 3, 2014, the Secretary of Labor exercised statutory responsibility and authority by extending the CW transitional worker program for an additional 5 years, through December 31, 2019. See Secretary of Labor Extends the Transition Period of the Commonwealth of the Northern Mariana Islands-Only Transitional Worker Program, 79 FR 31988 (June 3, 2014).

requests from new employers for an additional 1,298 beneficiaries.²⁵ The population affected by this provision of the final rule will be those CW-1 nonimmigrant workers whose subsequent extensions of stay requests are filed by the same employer. Accordingly, if this proposal were in place in FY 2014, all of the 8,952 CW-1 nonimmigrant workers with extension of stay requests with the same employer would have received the continued 240-day employment authorization, if necessary, generally putting these workers on par with CW-1 nonimmigrant workers with extension of stay requests for new employers.

This provision will not impose any additional costs on any petitioning employer or for CW-1 nonimmigrant workers. The benefits of this final rule will be that DHS will treat CW-1 nonimmigrant workers whose extension of stay request is timely filed by the same employer similar relative to other CW-1 nonimmigrant workers whose request is timely filed by a new employer. Additionally, this provision will mitigate any potential distortion in the labor market for employers of CW-1 nonimmigrant workers created by the differing provisions for retained workers versus provisions for workers changing employers and prevent a potential loss of productivity for current employers. Under current law, these benefits would be limited in duration, as the transition period in which CW-1 nonimmigrant worker classifications are issued is now scheduled to end on December 31, 2019. Unfortunately, USCIS does not have data to permit a quantitative estimation of the benefits²⁶ of this provision. Additionally, DHS did not receive data or additional information from impacted stakeholders that would permit DHS to

²⁵ Source: USCIS Office of Performance and Quality, January, 2015.

²⁶ The aggregate value of benefits would depend on several non-quantifiable factors including: the number of CW-1 workers prompted to change employment because of the automatic extension versus those changing for reasons of promotion and advancement or termination by their previous employer.

quantitatively estimate the benefits of this rule as it relates to CW-1 nonimmigrant workers in the CNMI. DHS believes, however, that the inconsistent treatment of employment authorization for CW-1 nonimmigrant workers could have created hardships to the CNMI labor force.²⁷

3. EB-1 outstanding professors and researchers

For the EB-1 outstanding professor and researcher immigrant classification, under current regulations, a petitioner must submit initial evidence to demonstrate that the beneficiary is recognized internationally as outstanding in his or her specific academic field. The type of evidence that is required is outlined in 8 CFR 204.5(i)(3).

To demonstrate that the EB-1 professor or researcher is recognized internationally as outstanding in his or her academic field, DHS, through this rulemaking, is allowing petitioners to substitute comparable evidence (examples might include award of important patents and prestigious, peer-reviewed funding or grants) for the evidence listed in 8 CFR 204.5(i)(3)(i)(A) – (F). See 8 CFR 204.5(i)(3)(ii). The other requirements remain unchanged. DHS made this change in response to stakeholder concerns that the current evidentiary list is dated and may not allow the beneficiary to present the full documentation of their achievements.²⁸

By allowing for comparable evidence, DHS will harmonize the evidentiary requirements of the EB-1 outstanding professor and researcher category with those

²⁷ See Joint letter to the Director, USCIS, from the Saipan Chamber of Commerce, the Hotel Association of the Northern Mariana Islands and the Society for Human Resource Management CNMI (Dec. 20, 2012).

²⁸ See Letter from Marlene M. Johnson, Executive Director and CEO of NAFSA: Association of International Educators, to Ivan K. Fong, General Counsel, DHS (Apr. 13, 2011), available at <http://www.nafsa.org/uploadedFiles/DHSregreviewcommentApr122011%20public.pdf>.

currently available to the EB-1 extraordinary ability category as well as the EB-2 category for a person of exceptional ability.

This provision of the final rule will not create additional costs for any petitioning employer or for the EB-1 outstanding professor and researcher classification. The benefits of this provision are qualitative, as it will treat EB-1 outstanding professors and researchers the same as certain other individuals who seek similar employment-based immigrant status under 8 CFR 204.5. Because of the expanded types of evidence that could be used to support an EB-1 petition for outstanding professors and researchers, qualified U.S. employers may find it easier to recruit EB-1 outstanding professors and researchers due to this provision. Recruitment may provide EB-1 outstanding professors or researchers with additional opportunities to contribute to his or her employer and field, furthering his or her international recognition.

As shown in Table 6, over the past 10 FY(s), USCIS approved an average of 93.23 percent of EB-1 petitions for outstanding professors and researchers under the current evidentiary standards. USCIS does not have data to indicate which, if any, of the 2,379 petitions that were not approved from FY 2005 through FY 2014 would have been approved under the proposed evidentiary standards. Furthermore, we are not able to estimate whether the proposed evidentiary standards would alter the demand for EB-1 outstanding professors and researchers by U.S. employers. Because of this data limitation, the further quantification of this benefit is not possible.

<p style="text-align: center;">Table 6 Immigrant Petition for Alien Worker (I-140) with Outstanding Professor or Researcher Preference Receipts and Completions, FY 2005-2014</p>
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FY	Receipts²⁹	Approved³⁰	Denied	Percent Approved
2005	3,089	5,455	391	93.31%
2006	3,111	3,139	165	95.01%
2007	3,560	2,540	300	89.44%
2008	2,648	2,223	187	92.24%
2009	3,209	3,991	309	92.81%
2010	3,522	3,199	332	90.60%
2011	3,187	3,090	218	93.41%
2012	3,112	3,223	194	94.32%
2013	3,350	3,180	147	95.58%
2014	3,549	3,357	136	95.58%
Total	32,337	33,397	2,379	10-Yr Avg: 93.23%

Source: Data provided by USCIS Office of Performance and Quality (OPQ), January 2015.

DHS welcomed public comments from impacted stakeholders, such as employers or prospective employers of an EB-1 outstanding professor or researcher, providing information or data that would enable DHS to calculate the resulting benefits of this provision. DHS did not receive any data on this request that would allow DHS to calculate quantitative benefits of this regulatory change. As indicated earlier in the preamble, DHS did receive comments suggesting that this change will benefit both U.S. employers that are petitioning for outstanding professors and researchers, and the individuals seeking immigration status under this classification.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies to consider the potential impact of

²⁹ Receipts are those filed within the FY indicated and include petitions from new arrivals and those that are seeking to adjust status.

³⁰ Approved and denied petitions may have been receipted in a previous FY.

regulations on small entities while they are developing the rules. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This final rule revises regulations to allow for additional flexibilities; harmonizes the conditions of employment of principal E-3, H-1B1, and CW-1 nonimmigrant workers with other, similarly situated nonimmigrant categories; and harmonizes the allowance of comparable evidence for EB-1 outstanding professors and researchers with evidentiary requirements of other similar employment-based immigrant categories. As discussed previously, DHS does not anticipate that the additional provisions will result in additional compliance costs for impacted U.S. employers, including any small entities, other than the minimal costs associated with reading and becoming familiar with benefits offered by the rule.

As discussed extensively in the regulatory assessment for Executive Orders 12866 and 13563 and elsewhere throughout the preamble, this final rule does not impose any additional compliance costs on U.S. employers. U.S. employers must continue filing extension of stay requests with DHS to extend the period of authorized stay of E-3, H-1B1, and CW-1 nonimmigrant employees, as is currently required. This final rule, however, will allow for a continued period of authorized employment for the nonimmigrant worker who is the beneficiary of this petition, provided that the petition is timely filed. This will provide increased flexibilities for the U.S. petitioning employers without imposing any additional costs or compliance procedures.

Based on the foregoing, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

This final rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995, Public Law 104-13, agencies are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting requirements inherent in a rule. See 44 U.S.C. 3506.

The information collection requirement contained in this rule, Immigrant Petition for Alien Worker, Form I-140, has been previously approved for use by OMB under the PRA. The OMB control number for the information collection is 1615-0015.

This final rule requires a revision to the Immigrant Petition for Alien Worker, Form I-140, instructions to expand the current list of evidentiary standards to include comparable evidence so that U.S. employers petitioning for an EB-1 outstanding professor or researcher may be aware that they may submit additional or alternative documentation demonstrating the beneficiary's achievements if the evidence otherwise described in 8 CFR 204.5(i)(3)(i) does not readily apply. Specifically, DHS is adding a new paragraph "b" under the "Initial Evidence" section of the form instructions, to specify that employers filing for an outstanding professor or researcher may submit comparable evidence to establish the foreign national's eligibility if the listed standards under 8 CFR 204.5(i)(3)(i) do not readily apply. DHS is also providing minor clarifying language updates to the form instructions to maintain parity among USCIS forms. DHS has submitted the revised information collection request (ICR) to OMB for review, and OMB has conducted a preliminary review under 5 CFR 1320.11.

DHS has considered the public comments received in response to EB-1 provision in the proposed rule, Enhancing Opportunities for H-1B1, CW-1, and E-3 Nonimmigrants

and EB-1 Immigrants, published in the Federal Register at 79 FR 26870 on May 12, 2014. DHS's responses to these comments appear under Part III.F of this final rule.

DHS did not receive comments related to the Immigrant Petition for Alien Workers, Form I-140, revisions. As a result, DHS will not submit any further changes to the information collection.

USCIS has submitted the supporting statement to OMB as part of its request for approval of this revised information collection instrument. There is no change in the estimated annual burden hours initially reported in the proposed rule. Based on a technical and procedural update required in the ICRs for all USCIS forms, USCIS has newly accounted for estimates for existing out-of-pocket costs that respondents may incur to obtain tax, financial, or business records, and/or other evidentiary documentation depending on the specific employment-based immigrant visa classifications requested on the Immigrant Petition for Alien Worker, Form I-140. This change in the ICR is a technical and procedural update and is not a result of any change related to this final rule.

Regulatory Amendments

List of Subjects

8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping, Students.

8 CFR Part 248

Aliens, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 204—IMMIGRANT PETITIONS

1. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1641; 8 CFR part 2.

2. Section 204.5 is amended by redesignating paragraphs (i)(3)(ii) and (iii) as paragraphs (i)(3)(iii) and (iv), respectively, and adding a new paragraph (i)(3)(ii) to read as follows:

§ 204.5 Petitions for employment-based immigrants.

* * * * *

(i) * * *

(3) * * *

(ii) If the standards in paragraph (i)(3)(i) of this section do not readily apply, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

* * * * *

PART 214—NONIMMIGRANT CLASSES

3. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281,

1282, 1301-1305 and 1372; sec. 643, Public Law 104-208, 110 Stat. 3009-708; Pub. L. 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

4. Section 214.1 is amended in paragraph (c)(1) by:

a. Revising the paragraph heading; and

b. Removing the first and second sentences, and adding one sentence in their place.

The revision and addition read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(1) Extension of stay for certain employment-based nonimmigrant workers. A petitioner seeking the services of an E-1, E-2, E-3, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1, or TN nonimmigrant beyond the period previously granted, must apply for an extension of stay on the form designated by USCIS, with the fee prescribed in 8 CFR 103.7(b)(1), with the initial evidence specified in § 214.2, and in accordance with the form instructions. * * *

* * * * *

PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

5. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

6. Section 248.3 is amended by revising the section heading and paragraph (a) to read as follows:

§ 248.3 Petition and application.

* * * * *

(a) Requests by petitioners. A petitioner must submit a request for a change of status to E-1, E-2, E-3, H-1C, H-1B, H-1B1, H-2A, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q-1, R-1, or TN nonimmigrant.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

7. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2.

8. Section 274a.12 is amended by:

- a. Revising the first sentence of paragraph (b)(9);
- b. Revising the first sentence of paragraph (b)(20);
- c. Removing the word “or” at the end of paragraph (b)(23);
- d. Removing the period at the end of paragraph (b)(24) and adding in its place “; or”; and
- e. Adding paragraph (b)(25).

The revisions and addition read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(9) A temporary worker or trainee (H-1, H-2A, H-2B, or H-3), pursuant to § 214.2(h) of this chapter, or a nonimmigrant specialty occupation worker pursuant to section 101(a)(15)(H)(i)(b1) of the Act. * * *

* * * * *

(20) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), (b)(19), (b)(23) and (b)(25) of this section whose status has expired but on whose behalf an application for an extension of stay was timely filed pursuant to § 214.2 or § 214.6 of this chapter. * * *

* * * * *

(25) A nonimmigrant treaty alien in a specialty occupation (E-3) pursuant to section 101(a)(15)(E)(iii) of the Act.

* * * * *

Jeh Charles Johnson,

Secretary of Homeland Security.

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